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Introduction

Following a criminal conviction, defense counsel hired a private investigator, who questioned the jurors as to how they reached their verdict.[1] He had telephone conversations with three of the jurors and a personal interview with a fourth. On the government's petition for an injunction prohibiting further questioning, the Federal District Court for the Southern District of New York *held:* an injunction should issue. The court stated that the jurors must be protected from outside influence or even the anticipation of such influence. Defense counsel argued that the purpose of such inquiry was to improve future trial tactics. The court, however, rejected this contention, saying that from the investigator's assertions and questions it was "apparent that the purpose was . . . 'to browse among [the jurors'] thoughts in search of something to invalidate their verdict.' "[2]

Two possible reasons an attorney would want to talk to jurors after a trial are: to discover information with which to impeach the jury's verdict, and to decide what influenced the jurors most in order to improve future trial tactics. Courts, however, generally have not distinguished these two objectives. Most cases hold simply that jurors should not be subjected to the pressure of public disclosure of what happened in the jury room.

The *Driscoll* case illustrates one of several developments that has thrown the issue of post-trial questioning of jurors before courts and other decision-making bodies. The Supreme Court, state appellate courts, and bar associations have each been commended and criticized for changing the law or ethics of questioning. In this comment, primary consideration is given to the law, ethics, and policy of informal questioning in its developmental, intermediate, and most recent stages. Some attention is collaterally paid to formal questioning—that conducted in the presence of a court. Finally, a proposal is made to bring order to this confused area.

1. United States v. Driscoll, 276 F. Supp. 333 (S.D.N.Y. 1967).
2. *Id.* at 338.

I. The Origin and Rationale of the Rule

From the institution of the jury system, courts have been faced with the problem of either insuring the secrecy of jury proceedings to preserve the integrity of that body or preventing abuses of justice in particular cases where juries might have failed in their appointed task. This dilemma has forged certain judicial exceptions to the general rule that the testimony of a juror may not be received to prove his misconduct or that of his colleagues in reaching a verdict.[3] This broad ban on attorney questioning stems from the attempt to implement three policies. The first of these is the protection of the jury system; the second, the protection of the jury member, a concept which has been strongly criticized in some of its judicial applications;[4] and the third, an ethical requirement of bar membership—an ideal standard partially born of the first two policies.

Protection of the Jury System

The Supreme Court long ago decided that indiscriminate post-trial questioning of jurors " 'would open the door to the most pernicious arts and tampering with jurors.' ... 'It would lead to the grossest fraud and abuse' and 'no verdict would be safe.' "[5] Less dramatic is the position of the Michigan Supreme Court, which thought post-trial examination of jurors unwise because, " '[t]he rule is well established that jurors may not impeach their verdict by affidavits. To permit this would open the door for tampering with the jury subsequent to the return of their verdict.' "[6] It is of considerable interest that the prohibition against jurors' impeaching their verdict by affidavit is abruptly extended to preclude post-trial examination of jurors, on the presumption that counsel would have no motive, other than impeachment, to seek information from the jurors.[7] This illus-

3. *See* Vaise v. Delaval, 99 Eng. Rep. 944 (K.B. 1785). Lord Mansfield's rule was quite rigid and held that the testimony of a juror could not be used to impeach a verdict, even though the jury's conduct, otherwise proved, would require a new trial. It is not difficult to understand how such a strict rule could be extended to deny counsel an opportunity to question jurors, and there can be little doubt that Lord Mansfield's rule is the true origin of the general rule denying attorneys the right to post-verdict examination of jurors.

4. Ferguson, *Legal Research on Trial,* 39 J. AM. JUD. SOC'Y 78, 86 (1955), where it is stated:

> The majority rule holds that the juror cannot testify to matters occurring in the jury room, and this rule insures the personal privacy of the juror .... However, this same privacy should not be extended to the jury as a body .... Since the jury is an arm of the court, and since the personal privacy of the jurors has been insured, there is no reason for surrounding the jury itself with secrecy.

5. McDonald v. Pless, 238 U.S. 264, 268 (1915). The Court quoted from Cluggage v. Swan, 4 Binn. 150, 155 (Pa. 1811), and Straker v. Graham, 150 Eng. Rep. 1612 (Ex. 1839). *See also* Hyde v. United States, 225 U.S. 347 (1912).

6. People v. Van Camp, 356 Mich. 593, 601, 97 N.W.2d 726, 731 (1959).

7. People v. Pulaski, 15 Ill. 2d 291, 155 N.E.2d 29 (1958).

trates how courts have ignored any motivation to question for the purpose of improving trial tactics. The extension is questionable on other grounds, as well.[8]

Other courts have gone so far as to call jury deliberations "sacred."[9] One of the most frequently advanced arguments against violation of the "sanctity" of the jury room is that such invasion and subsequent revelation would surely diminish public confidence in the jury system. *Rex v. Armstrong*[10] stated the argument this way:

> If one juryman might communicate with the public upon the evidence and the verdict so might his colleagues also, and if they all took this dangerous course differences of individual opinion might be made manifest which, at the least, could not fail to diminish the confidence that the public rightly has in the general propriety of criminal verdicts. Whatever the composition of a British jury may be, experience shows that its unanimous verdict is entitled to respect.[11]

The majority view is that any detriment to the party seeking to interrogate a juror is outweighed by the benefit of preventing possible jury tampering or harassment which could lead to a general breakdown of the jury system.[12]

Protection of the Jury Member

It has been recognized that secrecy protects each juror from disclosure of opinions made during the deliberations, concerning the credibility and motives of the parties and witnesses. Questioning by counsel after the trial may lead some jurors to make thoughtless or ill-considered statements which could bring about later embarrassment, if not actual harassment, from parties or witnesses.[13] The Supreme Court of Utah has instructed its courts to "be careful to keep inviolate the sanctity and secrecy of jury room discussions."[14] The same court has stated that "[s]uch post mortems would render service as a juror unbearable, and be productive of no end of mischief."[15]

Combining both the protection of the jury system and the protection of the jury members as controlling policy, the court in *Rakes v. United*

8. Ferguson, *supra* note 4, at 86, stating: "Just as physicians observe a living human patient for research purposes, the improvement of the administration of justice necessitates the limited use of direct observation [of the jury]."
9. United States v. 120,000 Acres of Land, 52 F. Supp. 212, 213 (N.D. Tex. 1943).
10. 2 K.B. 555 (1922).
11. *Id.* at 568.
12. *See, e.g.*, West v. State, 409 P.2d 847 (Alas. 1966).
13. Caldwell v. Yeatman, 91 N.H. 150, 15 A.2d 252 (1940).
14. Gribble v. Cowley, 100 Utah 217, 221, 112 P.2d 147, 148 (1941).
15. Ostertag v. La Mont, 9 Utah 2d 130, 135, 339 P.2d 1022, 1025 (1959).

States[16] spoke for many courts when it strongly decried post-verdict examination, stating:

> [J]urors are not to be harassed in any manner because of a verdict they have rendered. If jurors are conscious that they will be subjected to interrogation or searching hostile inquiry as to what occurred in the jury room and why, they are almost inescapably influenced to some extent by that anticipated annoyance. The courts will not permit that potential influence to invade the jury room. He who makes studied inquiries of jurors as to what occurred there acts at his peril, lest he be held as acting in obstruction of the administration of justice. Much of such conversation and inquiry may be idle curiosity, and harmless, but a searching or pointed examination of jurors in behalf of a party to a trial is to be emphatically condemned. It is incumbent upon the courts to protect jurors from it.[17]

Ethical Considerations

In some jurisdictions, professional ethics completely forbid the post-trial questioning of jurors. In Pennsylvania, "[t]he practice of interviewing jurors after a verdict and obtaining from them ex parte, unsworn statements in answer to undisclosed questions and representations by the interviewers is highly unethical and improper . . . ."[18] *Northern Pacific Railway v. Mely*,[19] a federal case, set forth the ethical rationale:

> In metropolitan areas where the same jurors serve for some time, it is possible to forecast a jury's verdict if their previous alignment in other cases is made plain by inquiry. An abuse in inquisitions by the staff of the prosecutor in long jury terms will show the proper jurors to be challenged in a close criminal case. . . .
>
> . . . [I]t is improper and unethical for lawyers, court attachés or judges in a particular case to make public the transactions in the jury room or to interview jurors to discover what was the course of deliberation of a trial jury.[20]

II. State Cases—Some Exceptions to the Rule

A majority of state courts, which have considered the question of whether counsel may interrogate jurors subsequent to trial, have responded negatively. (The results and rationales prevailing in some jurisdictions have

16. 169 F.2d 739 (4th Cir.), *cert. denied*, 335 U.S. 826 (1948).

17. *Id.* at 745-46. *See also* United States v. Schneiderman, 106 F. Supp. 906, 925 (S.D. Cal. 1952), where the court held that a searching or pointed examination of jurors in behalf of a party to a trial as to acts which occurred in the jury room is to be condemned.

18. Commonwealth *ex rel.* Darcy v. Claudy, 367 Pa. 130, 133-34, 79 A.2d 785, 786 (1951).

19. 219 F.2d 199 (9th Cir. 1954).

20. *Id.* at 201-02.

already been mentioned.[21]) There is, however, unanimity neither as to result nor rationale.

In two states, New Jersey and Florida, the result hinges on codified court rules of a procedural or of an ethical nature.[22] Thus, the New Jersey Supreme Court has adopted a rule providing: "No attorney shall himself or through any investigator or other person acting for him interview, examine or question any juror with respect to the verdict or deliberations of the jury in any action except on leave of court granted upon *good cause shown.*"[23] (Emphasis added.) This rule is not as liberal, nor does it reflect as significant a change, as may appear at first glance. The saving clause for the general prohibition against questioning is "upon good cause shown." Application of this rule in *State v. LaFera*[24] is illustrative. Seeking to impeach a verdict, counsel hired private investigators. He instructed them not to interview jurors because of the "good cause" requirement and the necessity for leave of court. The investigators did not interview jurors, but meddled in their affairs by contacting relatives, friends, and associates. Eventually, they obtained an affidavit from a juror's co-worker stating that the juror strongly disliked persons of Italian descent and had expressed belief as to the defendant's guilt before the trial. Attempting to introduce the affidavit, defendant urged that due process of law required the availability of jury interrogation to discover vulnerability in the verdict.[25]

The court conceded an apparent inconsistency in delineating the grounds for the invalidation of the verdict, but simultaneously denied the litigant an opportunity to establish the occurrence of the requisite events. The fate of the defendant, the court said, is made to rest on "sheer luck"—the chance that the wrongful event will come to light. Nevertheless, it was concluded that when contending values clash, a balance must be struck, and the balance struck is not unsound merely because in some unknowable cases there may be injustice.[26]

21. *See* text *supra* at notes 6-15.
22. *See* text *infra* at note 32.
23. N.J. REV. R. 1:25A.
24. 42 N.J. 97, 199 A.2d 630 (1964). *See also* United States v. Provenzano, 240 F. Supp. 393, 412-13 (D.N.J. 1965), citing *La Fera* approvingly.
25. *Cf.* People v. DeLucia in text *infra* at note 64.
26. And even within that limited group [of unknowable cases], a new trial may be a windfall for the defendant, since if the misconduct is capable of tainting the verdict, the verdict will be set aside without inquiry into the actual impact of that misconduct upon the result. [Citing cases.] Thus there is but a small factor of possible hurt. Against this must be weighed the substantial interest of the public and of defendants as a group, in the full and free debate in the jury room. We think the approach of our rule is correct. In any event we see no constitutional difficulty.
State v. La Fera, *supra* note 24, at 106-08, 199 A.2d at 636.

Thus, the result under the New Jersey rule is identical to that reached under the common law in most other jurisdictions:[27] Before questioning one must show good cause; this, without in any way encroaching upon the "sanctity" of the jury or of any juror. The irony is apparent—if some infirmity in the verdict is provable through sources other than jurors, the need to question jurors is sharply reduced. In other words, a fully independent source is always necessary, but only when one exists does the right to question jurors materialize; the existence of the independent source, however, often means that it is no longer necessary to invoke that right. The reason is that at least in criminal cases and federal civil cases, the source need not provide definite proof of the verdict's infirmity but only doubt of its validity. The burden of sustaining the verdict then shifts to the party opponent.[28] If the source fails to raise that requisite doubt, neither could "good cause" under any standard be established.

In *People v. DeLucia,*[29] New York has circumvented the problem raised by *LaFera,* but only by a questionable interpretation of the Supreme Court's per curiam opinion in *Parker v. Gladden,*[30] where the Court held that the bailiff's remarks to jurors violated the defendant's sixth amendment confrontation rights. Perhaps the New York Court of Appeals felt obliged to reverse itself, since the remand from the federal court of appeals suggested a reconsideration of the first disposition of the case in view of *Parker.*[31] Both *DeLucia* and *Parker* will be analyzed subsequently.[32]

The Florida Code of Ethics Governing Attorneys, Canon 23, provides:

> Subject to any limitation imposed by law it is a lawyer's right, after the jury has been discharged to interview the jurors solely to determine whether their verdict is subject to any legal challenge provided he has *reason* to believe that ground for such challenge may exist, and further provided that prior to any such interview made by him or under his direction, he shall file in the cause, and deliver a copy to the trial judge and opposing counsel, a notice of intention to interview such juror or jurors. The scope of the interview should be restricted and caution should be used to avoid embarrassment to any juror and to avoid influencing his action in any subsequent jury service.[33] (Emphasis added.)

27. For a brief discussion and collection of cases, *see* Sharp v. Merriman, 108 Mich. 454, 66 N.W. 372 (1896).

28. Remmer v. United States, 347 U.S. 227 (1954) (criminal); Stiles v. Lawrie, 211 F.2d 188 (6th Cir. 1954) (civil).

29. 20 N.Y.2d 275, 229 N.E.2d 211, 282 N.Y.S.2d 526 (1967), *remitting* 15 N.Y.2d 294, 206 N.E.2d 324, 258 N.Y.S.2d 377 (1965).

30. 385 U.S. 363 (1966).

31. United States *ex rel.* DeLucia v. McMann, 373 F.2d 759 (2d Cir. 1967).

32. *See* text *infra* at note 58.

33. 31 F.S.A. CODE OF ETHICS Rule B, § 1 (23) (1966).

After this rule was effected in 1966, it became the practice of some attorneys to secure exhaustive post-trial investigations directed at the conduct and reasoning which took place within the jury room. In an attempt to avoid Canon 23, which on its face applied only to lawyers, the information was elicited by private investigators. The admissibility of evidence so acquired was passed on by a Florida district court of appeals which stated that "[u]ndoubtedly, there are cases where through appropriate means post-trial investigations as to the conduct of the trial should be conducted. But this . . . should be with the consent of the trial court or at least with his knowledge."[34] In contrast to the New Jersey "good cause" requirement, Florida demands only that the attorney have "reason" to believe that grounds for the challenge may exist and that he inform the trial judge of his intention to question. Obviously, the Florida court's interpretation of "reason" is more permissive than the interpretation of "good cause" in New Jersey.

In New Hampshire, the policy is to discourage any discussion between jurors and defeated counsel.[35] Whether winning counsel may interview is speculative. If the courts there are attempting to distinguish between questioning for appeal purposes and questioning for the improvement of trial tactics, the prevailing rule presumes that losing counsel's purpose in questioning would be to impeach the verdict, while the court does not attribute that motive to winning counsel.

Still another view prevails in Texas and Ohio. In the latter state, in *Patrick v. Yellow Cab Co.*,[36] an appellate court remarked:

> [T]here is no rule or provision of law or public policy that prohibits the informal interrogation of a juror after the return of a

34. Pix Shoes of Miami, Inc. v. Howarth, 201 So. 2d 80, 83 (Fla. Dist. Ct. App. 1967).

35. Caldwell v. Yeatman, *supra* note 13. In this case, the defendants filed motions to have the jury recalled and interrogated. In support of these motions, counsel for defendants filed their own affidavits in which they recounted the results of conversations had by them with the members of the jury after the latter had been discharged and had separated. Defendants' motions were denied and they excepted. The Supreme Court of New Hampshire overruled the exceptions, stating that although the court could recall jurors for interrogation, it was within the trial court's discretion and was reviewable only on a showing of abuse of discretion. The court added that discussion of cases by defeated counsel with jurors after trial should be discouraged. A reason cited by the court was that jurors make ill-considered statements to counsel. Presumably, the court feared that this would lead to ill-founded appeals. Since winning counsel's motivation for interviewing is likely to be different from that of losing counsel's (improvement of trial tactics), the policy reasons against interviewing would be applicable only to losing counsel and in New Hampshire, arguably, the winning counsel could interview.

36. 102 Ohio App. 312, 114 N.E.2d 735, 736 (1953). In this case, a juror had made measurements of a cab during the trial while away from the jury room. This alleged misconduct was learned by an interviewer of the defendant cab company during a post-verdict interrogation at the juror's home. At a motion for a new trial, defendant's counsel sought to question the juror concerning this interview. The trial judge sustained the objection of plaintiff and stated that such questioning of jurors was illegal.

> verdict. A juror so interviewed may respond or not as he sees fit, but any statement made by the juror as to his or any other juror's conduct in or out of the jury room is inadmissible for the purpose of impeaching the verdict in the absence of evidence aliunde.[37]

In this case the interviews were conducted by nonattorney representatives of the defendant cab company, and at a hearing for a new trial defendant's counsel sought to question the jurors respecting these interviews. The court did not limit its remarks to the specific facts and stated that counsel could interview jurors. Counsel must, however, have "outside" evidence before any affidavits can be used to impeach the verdict. This procedure is the reverse of that followed in New Jersey. In Ohio, an attorney may interview first in order to gather a valuable lead to the discovery of necessary "outside" evidence. The rule, it appears, would be effective were it not that the court refused to require jurors to answer questions.

To the complaint of defeated counsel that members of the jury refused to answer his questions, the Texas Court of Criminal Appeals is equally unsympathetic. In one case,[38] disposition was based on the absence of a statute requiring jurors to answer. Defense counsel argued that since the jurors had answered the questions of the prosecution, fairness required that they be compelled to answer those of the defense. The court was unimpressed. Nevertheless, as in Ohio, even though jurors will not be compelled to answer, counsel may interview.

III. Supreme Court Cases—Their Effect

A number of opinions from the United States circuit courts of appeals purport to find authority for counsel questioning of jurors in several Supreme Court opinions.[39] In the opinions most often cited by the courts of appeals, the Court was more concerned with the "evils" of jurors impeaching their own verdicts than by whom jurors were questioned, if anyone.[40]

In re *Sawyer*[41] is the one case in which the issue of a lawyer questioning jurors after the verdict was before the Supreme Court. The petitioner in *Sawyer* was suspended from the practice of law by the Territorial Supreme Court of Hawaii. The Court found, though, that the punishment had

37. *Id.* at 314, 114 N.E.2d at 736.

38. Crain v. State, —Tex. Crim.—, 394 S.W.2d 165 (1964), *cert. denied*, 382 U.S. 853 (1965).

39. *See e.g.*, Rees v. Peyton, 341 F.2d 859, 864-65 (4th Cir. 1965) (dicta); *In re* Sawyer, 260 F.2d 189, 231 (9th Cir. 1958) (dissenting opinion); Bryson v. United States, 238 F.2d 657, 665 n.12 (9th Cir. 1956) (dicta); Ryan v. United States, 191 F.2d 779, 781 (D.C. Cir. 1951). Rotondo v. Isthmian S.S. Co., 243 F.2d 581, 583 & 583 n.2 (2d Cir. 1957) cites the same cases as barring questioning; they neither bar nor permit.

40. *See* text *infra* at notes 41-53.

41. 360 U.S. 622 (1959).

been administered for other misconduct and not, as alleged, for the post-trial questioning; thus, it reversed on the other issue presented.

Mr. Justice Brennan said, speaking for the majority:

> While there is clearly some delicacy involved in approaching a juror who has become mentally unsettled, evidence that a juror was incompetent at the time of the rendition of the verdict might be admissible to impeach a verdict where evidence of the jury's mental and reasoning processes is not. While the interviews were undertaken under unusual circumstances, it is difficult to say whether the circumstances furnish more or less justification than is present in the average juror interview . . . .[42]

Since the Hawaii court did not hold the questioning censurable in this case, but only as to future instances, the Supreme Court refused to explore the matter further. The Supreme Court did note the Hawaii court's warning that future interrogation of jurors, concerning occurrences in the jury room and the reasons why the jury reached its verdict, would be at the peril of the interrogator.[43]

In the cases often cited as precedent for counsel's interrogating jurors, the Court has actually constructed a maze of rules on jurors impeaching their own verdicts. As these cases have been the subject of strained inference and misinterpretation, a brief analysis of them follows.

The first exception to the rule barring jurors' affidavits of impeachment was set forth in *Mattox v. United States*:[44] affidavits may be received to " 'prove something which did not essentially inhere in the verdict, an overt act, open to the knowledge of all the jury, and not alone within the personal consciousness of one.' "[45] Matter resting in the personal consciousness of a *single* juror is inadmissible since " 'being personal it is not accessible to other testimony; it gives to the secret thought of one the power to disturb the expressed conclusions of twelve . . . .' "[46]

In *McDonald v. Pless*,[47] the Court did not expressly reject the *Mattox* rationale that overt acts open to the knowledge of *all* the jurors did not inhere in the verdict, but it limited the exception to the "the gravest and most important cases."[48] In permitting McDonald's quotient verdict to stand, however, the Court did appear to retreat from *Mattox*. It viewed

42. *Id.* at 637-38.
43. 41 Hawaii 403, 425, *aff'd*, 260 F.2d 189 (9th Cir. 1958), *rev'd on other grounds*, 360 U.S. 622 (1959).
44. 146 U.S. 140 (1892).
45. *Id.* at 149, quoting from Perry v. Bailey, 12 Kan. 539, 545 (1874).
46. *Id.* at 148, also quoting from Perry v. Bailey, *supra* note 45.
47. 238 U.S. 264 (1915).
48. *Id.* at 269.

jury deliberations as not inhering in the verdict only if misconduct of a nonjuror was present,[49] as in *Mattox,* where the bailiff had made prejudicial remarks to the jury about the defendant.[50]

Though the Court provides no specific criteria for determining the "most important" cases, it is possible that the *Mattox* exception to "the gravest" cases implies a distinction between criminal and civil cases.[51] In any event, in neither the *Mattox* nor the *McDonald* opinion does it appear that counsel questioned any juror after trial.[52] Indeed, there is nothing to support a conclusion that anyone even attempted to question the jurors in *Mattox.* It is entirely possible that, as happened in *United States v. Grieco,*[53] a juror voluntarily contacted the trial judge concerning his vote. Unless counsel actually questioned jurors in those cases, they are not, of course, authority for post-trial questioning of jurors.

A third case cited as precedent for post-trial interrogation of jurors is *Clark v. United States.*[54] Yet, even a cursory reading distinguishes *Clark* from the situation under discussion. Clark had been a juror and sought to invoke a privilege against juror testimony in her own trial for contempt. The Court refused to recognize that any such right belonged to a juror, herself on trial, charged with concealing material information on voir dire.

In *Parker v. Gladden,*[55] defendant's wife, two years after his conviction, propounded a series of questions to jurors, who revealed that the bailiff

49. *Id.* at 267. *Cf.* E.L. Farmer & Co. v. Hooks, 239 F.2d 547, 553-54 (10th Cir. 1956); Wright v. Illinois & Miss. Tel. Co., 20 Iowa 195 (1866).

50. Also in *Mattox,* a newspaper article prejudicial to the defendant was introduced into the jury room. It is not clear from the opinion, however, whether a member of the jury or the bailiff or still another person brought the newspaper into the jury room. The remarks of the bailiff were, "[a]fter you fellows get through with this case it will be tried again down there. Thompson has poison in a bottle that them fellows tried to give him." On another occasion he said, "[t]his is the third fellow he has killed." Mattox v. United States, *supra* note 44, at 142.

51. Also possible is a distinction between capital and noncapital cases. *See generally* United States v. McCorkle, 248 F.2d 1, 8 (3d Cir. 1957).

52. This comment is primarily concerned with the questioning of jurors without the supervision of the court. In *McDonald,* the opinion of the circuit court, 206 F. 263 (4th Cir. 1913), points out that counsel attempted to question jurors during a hearing before the judge. He was not allowed to do so. It is equally apparent from the circuit court opinion that before counsel attempted to question at the hearing, he had acquired the information with which he was trying to impeach the verdict. Had he obtained this information from questioning jurors without the presence of the court, it would be the type of questioning of direct concern here. However, there is no indication that he did so. The fact that no other witness was introduced to testify to the facts that he was trying to extract from the jurors themselves may indicate that here was no other witness. However, it is still quite possible that a juror made the information known to counsel without any questioning on the latter's part. In any event, when questioning was attempted, it was not allowed.

53. 261 F.2d 414 (2d Cir. 1958); Wharton v. People, 104 Colo. 260, 90 P.2d 615 (1939).

54. 289 U.S. 1 (1933).

55. 385 U.S. 363 (1966).

had made prejudicial remarks to jurymen.[56] The Supreme Court of Oregon affirmed the conviction, because, its opinion stated, ". . . the bailiff's misconduct did not deprive defendant of a constitutionally correct trial,"[57] and that *Mattox* was not of constitutional dimensions and was not, therefore, controlling in state courts. The court did, however, place reliance on *McDonald,* whose facts, which will be more fully examined, are less analogous to *Parker* than are those of *Mattox*. The Supreme Court reversed the Oregon court because the defendant had been denied his sixth amendment right to be confronted with the witnesses against him.

In *Parker,* there is a factual clarity not found in *Mattox* or *McDonald.* In this case, at least, it is clear that no juror offered unsolicited information to the trial judge or to any party or officer of the court, and that jurors were questioned, but not by an attorney.

Even though no attorney questioned the jurors at the critical stage[58]—and the Court did not direct itself to that issue—the possibility that *Parker* is authority in the federal system for attorney interrogation of jurors has been raised.[59] Justice Harlan's dissenting opinion, however, should give courts grave misgivings about embarking on so liberal an interpretation of that case. Justice Harlan wrote:

> The potentialities of today's decision may go far beyond what, I am sure, the Court intends. . . . But in allowing Parker to overturn his conviction on the basis of what are no more than inconsequential incidents . . . the Court encourages others to follow his example in pursuing the jury and may be thought by some to commit federal courts in habeas corpus . . . to interrogate the jury upon the mere allegation that a prejudicial remark has reached the ears of one of its members.[60]

Justice Harlan's remarks were prophetic. In *People v. DeLucia,*[61] the first case decided under *Parker,* an investigator employed by defense counsel

56. It was discovered that the bailiff stated to one of the jurors in the presence of the others, while the jury was out walking on a public sidewalk: "'Oh that wicked fellow [petitioner], he is guilty . . . .'" On a similar occasion the bailiff remarked, "'[i]f there is anything wrong [in finding the petitioner guilty] the Supreme Court will correct it.'"

57. Parker v. Gladden, —Ore.—, 407 P.2d 246 (1965), *rev'd per curiam,* 385 U.S. 363 (1966).

58. Again, the primary concern here is with informal questioning. The critical stage for that purpose is a time other than during a hearing conducted by the court. *See supra* note 52.

59. United States v. Driscoll, 276 F. Supp. 333, 338 (S.D.N.Y. 1967), where the court said: "It can plausibly be argued that the decision in [Parker] necessarily presupposes that it was proper for defendant to secure these statements in this fashion. But . . . [i]t does not follow . . . that such an inquiry should be allowed in every case."

60. Parker v. Gladden, *supra* note 55, at 369.

61. 20 N.Y.2d 275, 229 N.E.2d 211, 282 N.Y.S.2d 526 (1967), *remitting* 15 N.Y.2d 294, 206 N.E.2d 324, 258 N.Y.S.2d 377 (1965).

obtained statements from five members of the jury disclosing that jurors had visited the scene of the crime. Appeal was taken on the basis that the jurors' unauthorized view was improper. The New York Court of Appeals held that the jurors' affidavits were incompetent evidence and would not be received. Alleging a denial of due process, the defendant brought a petition for a federal writ of habeas corpus. On the district court's denial of the petition,[62] appeal was taken to the United States Court of Appeals for the Second Circuit.[63] Using *Parker* as a basis, that court vacated the state court's order, and, to give the New York courts an opportunity to reconsider the previous disposition of appellant's claims, the habeas corpus was dismissed without prejudice. On reconsideration, the New York Court of Appeals reversed and stated:

> Our New York case law holds that statements by jurors impeaching their own verdicts are inadmissible. [Citing cases.] However, where the Supreme Court holds that a particular series of events, *when proven,* violates a defendant's constitutional rights, implicit in that determination is the right of the defendant to prove facts substantiating his claim. (Emphasis added.)
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> * * *
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> In this case, our refusal to allow admission of the jurors' statements would, under Parker v. Gladden . . . amount to a denial of defendants' fundamental constitutional rights.[64]

At least in criminal cases, this interpretation of *Parker* would result in national uniformity by eliminating the plethora of state rules. Yet, appealing though that may be as a solution to the *LaFera* anomaly,[65] it is submitted that *Parker* and *DeLucia* are distinguishable.

While the Court in *Parker* did not make specific reference to post-trial questioning, had the case originated in the federal court system, the *McDonald* test would have admitted the testimony of jurors, but the *Mattox* criteria may have excluded it. Application of the same principles to *DeLucia* results in exclusion under *McDonald* with only possible admission under *Mattox*.

62. The district court opinion has not been reported. However, the court of appeals, quoting from the district court's opinion, said: "The petition was denied and dismissed without a hearing on the ground that the jury's alleged 'irregularity does not rise to the stature of being State action violative of fundamental liberties guaranteed by the Federal Constitution.'" United States *ex rel.* DeLucia v. McMann, 373 F.2d 759, 760 (2d Cir. 1967).

63. United States *ex rel.* DeLucia v. McMann, *supra* note 62.

64. People v. DeLucia, *supra* note 61, at 277-78, 278 n.1, 229 N.E.2d at 213, 213 n.1, 282 N.Y.S.2d at 528, 529 n.1.

65. *See* text *supra* at notes 27-30.

The explanation for this is that *Parker* involved the misconduct of the bailiff, a third party, whose misconduct, under the *McDonald* test, would not "inhere in the verdict." *Mattox,* the earlier case, held that overt acts "open to the knowledge of all the jury . . ." did not inhere, but that which is within the personal consciousness of a single juror did.[66] The wrongdoing in *Parker,* therefore, involving a third party, brings it within the *McDonald* rule of noninhering. However, since it was within the consciousness of *more than one* but *fewer than all* the jurors, it is unclear whether the vague test in *Mattox* is satisfied.

While the Oregon Supreme Court correctly stated that *McDonald* was intended to limit *Mattox,*[67] it can be seen that in particular cases, such as *Parker,* the *McDonald* standard is the more liberal. *DeLucia,* in contrast to *Parker,* involved wrongdoing only by jurors and, thus, does not meet the *McDonald* third-party noninhering test. Here too, however, since more than one juror, but not all jurors were involved, it does not clearly meet the *Mattox* test.

Parker, it must be emphasized, spared the Court from grappling with the established Oregon policy against admitting jury testimony.[68] The explanation is that in reaching its decision the Oregon court answered a "federal question." It did not reject the evidence in support of a new trial simply on grounds that it was based solely on jurors' affidavits[69]—the precise ground on which the New York Court of Appeals rejected DeLucia's first petition for reversal.[70] Had the Oregon court also held on this point, the absence of a federal question probably would have led the Supreme Court to refuse jurisdiction.[71]

Though the Supreme Court itself has never so authorized, some federal courts, on their own authority, do permit post-trial interrogation of jurors by attorneys.[72] Interrogation is limited, though, to overt acts and may not be directed toward the juror's personal consciousness. The reason for this is the Supreme Court's holding that jurors' testimony will not be received to show matters inhering in the verdict,[73] a holding the lower courts have interpreted to prohibit even questioning about such matters.

66. Mattox v. United States, *supra* note 44, at 149.
67. Parker v. Gladden, *supra* note 57, at—, 407 P.2d at 250.
68. *See, e.g.,* State v. Ausplund, 86 Ore. 121, 167 P. 1019 (1917).
69. Parker v. Gladden, *supra* note 55, at 364-65.
70. People v. DeLucia, 15 N.Y.2d 294, 296, 206 N.E.2d 324, 325, 258 N.Y.S.2d 377, 378 (1965).
71. That refusal to accept affidavits may, in itself, be a denial of due process in some circumstances, is not denied. Hyde v. United States, 225 U.S. 347 (1912). However, that was not the holding in *Parker.*
72. *See, e.g.,* Paramount Film Distrib. Corp. v. Applebaum, 217 F.2d 101, 104-22 (5th Cir. 1954).
73. Hyde v. United States, 225 U.S. 347 (1912). *See also* NLRB v. Botany Worsted

In *United States v. El Rancho Adolphus Products,*[74] defendant's counsel sought permission to take the testimony of jurors for the purpose of determining what effect an allegedly improper argument of government counsel had upon the verdict. The court, rejecting defense counsel's contention that *Mattox* supported such examination, held that *Mattox* specifically condemned inquiry as to the effect of such argument upon the jurors' minds.

In *Bryson v. United States,*[75] defendant's request to interrogate jurors was denied, although the court conceded that interrogation "is permitted when there is some indication that grounds for impeachment of their verdict may be disclosed thereby."[76] In other words, a condition precedent to questioning is that any information sought must be of such a nature that it could be introduced by affidavit. In 1965, the federal rule was explained in *Rees v. Peyton*:[77]

> The judgment a juror expresses in the verdict is not subject to subsequent public sounding.
>
> * * *
>
> Of course, a juror may after a verdict be queried as to information, whether documentary or oral in nature, introduced into the jury room but not put before them at trial. Similarly, the intrusion of a stranger, or the *misconduct* of a juror, during deliberations is open to such inquiry.[78] (Emphasis added.)

Attorneys must exercise care, though, since the juror misconduct referred to would seem to be limited to extraneous influence as, for example, viewing the scene of the crime or incident in issue.

Federal Courts in Diversity

Subsequent to 1938, no federal court, sitting in diversity, has specifically held concerning the propriety of post-trial examinations.[79] Therefore,

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Mills, Inc., 106 F.2d 263, 264-65 (1939), for the application of the principle against questioning on matters inhering in the verdict to the judicial function of an administrative board.

74. 140 F. Supp. 645 (M.D. Pa. 1956).

75. 238 F.2d 657 (9th Cir. 1956).

76. *Id.* at 665.

77. 341 F.2d 859 (4th Cir. 1965).

78. *Id.* at 864-65.

79. *See generally* Gault v. Poor Sisters of St. Frances Seraph of the Perpetual Adoration, Inc., 375 F.2d 539, 549-51 (6th Cir. 1967) (dicta, federal law controls); McDonald v. Pless, *supra* note 47, was a diversity case in which the question arose, but only as to questioning in a formal setting. Here, we are only concerned with diversity cases after Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

whether federal law or, under *Erie R.R. v. Tompkins*[80] and its progeny, the law of the state in which it sits would be applicable is not entirely clear.

The United States District Court for Maryland, in *Liggett & Myers Tobacco Co. v. Imbraguglia*,[81] considered whether jurors' affidavits should be received to support a motion for a new trial. The court's holding may by inference be dispositive of post-trial questioning. It said: "If it be asserted that Rule 43 (a) [form and admissibility of evidence] of the Federal Rules of Civil Procedure . . . requires—which, however, we do not believe to be the case—an adherence to local State Court procedure, in a matter of this kind . . . suffice it to say that the conclusion which we reach . . . is also in conformity with Maryland law."[82] The recognition that the introduction of affidavits is governed by federal law and that questioning will not be allowed if affidavits cannot be introduced justifies the inference that federal law controls.

Since *Erie*, the Supreme Court has proffered a number of rules for determining whether state or federal law will apply: the substance versus procedure test,[83] the outcome determinative test, [84] and the extension of the outcome test to the point of subordinating the Federal Rules of Civil Procedure.[85] A more recent standard, which appears to settle the issue under consideration, is found in *Hanna v. Plumer*.[86] There, the Court stated that *Erie* was designed to eliminate "forum shopping"; in diversity cases, therefore, where the issue presented would not be a factor in the selection of the forum, the federal court would not be bound by state law. Since the availability of post-trial questioning of jurors would not seem in any case to be a consideration influencing the choice of forum, a federal court should be free to apply its own rule regarding such questioning if it characterizes questioning as procedural. The federal courts will not be bound by state law on this matter, since they do deem it procedural. A recent pronouncement on the subject was made by the district court of New Jersey in the 1965 case of *United States v. Provenzano*,[87] which held that the determination would be made by state law. Paradoxically, this holding supports the view that the matter is procedural. The court stated:

80. 304 U.S. 64 (1938).
81. 73 F. Supp. 909 (D. Md. 1947).
82. *Id.* at 919.
83. Erie R.R. v. Tompkins, *supra* note 80.
84. Guaranty Trust Co. v. York, 326 U.S. 99 (1945).
85. Ragan v. Merchants Transfer & Warehouse Co., 337 U.S. 530 (1949).
86. 380 U.S. 460 (1965).
87. 240 F. Supp. 393 (D.N.J. 1965).

> A specific rule on this subject has not been adopted by this Court. But the State rule becomes applicable by virtue of General Rule 18 of this Court which provides as follows:
>
> *"Applicability of State Court Procedure*
> "In circumstances not provided for by the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, or these General Rules, the procedure and practice of the courts of the State of New Jersey shall govern."[88]

It must be noted that the court held state law applicable, not because it was substantive in nature, but because that federal district's procedural rules called for state law application. Only the United States District Court for the District of New Jersey has committed itself to following state rules in such matters. The federal rules governing civil and criminal procedure each permit district courts to make their own rules with regard to matters not covered by the federal rules.[89] These rules need not conform to state procedure.[90] Only a few district courts have adopted published rules prescribing the procedure to be followed in the absence of a federal rule.[91] The other district courts can "adopt and enforce their own self-preserving rules."[92]

88. *Id.* at 413.

89. *See* FED. R. CIV. P. 83: "Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules.... In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules." FED. R. CRIM. P. 57 (b): "If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute."

90. *See* Advisory Committee's Note to FED. R. CRIM. P. 57 (b): "One of the purposes of this rule is to abrogate any existing requirement of conformity to State procedure on any point whatsoever."

The Supreme Court has held that the Conformity Act, formerly 28 U.S.C. § 724, which required the federal courts to follow state procedure, was repealed by the Federal Rules of Civil Procedure. Sibbach v. Wilson & Co., 312 U.S. 1, 10 (1941).

91. *See* S.D. CAL. R. 29; N.D. ILL. CIV. R. 19; NEVADA R. 31; S.D. AND E.D. N.Y. CIV. R. 15; W.D. WASH. R. 68. All six rules generally provide that if a procedural question arises which is not covered by a federal statute, the Federal Rules or other published rules of the local district court, the "procedure heretofore prevailing in courts of equity of the United States shall be applied . . . ." The old federal equity courts were bound to state procedure by the Conformity Act, but following McDonald v. Pless, *supra* note 47, the federal courts were probably not bound to follow state procedure with regard to questioning jurors after the verdict. Where there was no prevailing procedure in the courts of equity, the six courts split as to what course to follow. S.D. CAL. R. 29 and NEVADA R. 31 provide that the court "may proceed in any lawful manner not inconsistent with these rules or with any applicable statute." N.D. ILL. CIV. R. 19 provides that "in the discretion of the court, the procedure which shall then prevail in the Circuit Courts of the State of Illinois may be applied." S.D. AND E.D. N.Y. CIV. R. 15 provides that "in the discretion of the court, the procedure which shall then prevail in the Supreme Court or the Surrogates Court as the case may be of the State of New York may be applied." W.D. WASH. R. 68 provides that "the procedure which shall then prevail in the Superior Courts of the State of Washington shall be applied."

92. McDonald v. Pless, *supra* note 47, at 266.

Only one district court has a published rule expressly prohibiting informal interrogation of jurors,[93] while a Texas district court, apparently influenced by the liberal rules of the state in which it sits, merely requires counsel to "[r]efrain from approaching jurors who have completed a case until after they have left the courthouse."[94] Seventeen of the ninety-two district courts have published rules adopting the Canons of Professional Ethics of the American Bar Association as the standard of conduct for members of their bars.[95] The Canons in turn present still other problems.

IV. The American Bar Association—Accommodation to Change

The question whether it is ethical for a lawyer to communicate with jurors after a trial was recently considered by the Committee on Professional Ethics of the American Bar Association. Opinion 319[96] reevaluates the interpretation of Canon 23 which provides that "[a] lawyer must never converse privately with jurors about the case; and both before and during the trial he should avoid communicating with them, even as to matters foreign to the cause."[97] Canon 23 refers only to the period before and during the trial; it says nothing about lawyer-jury communication after the trial, a silence which has evoked conflicting opinions on the interpretation of the Canon.[98]

In 1934, the Committee considered whether Canon 23 prohibited a lawyer from questioning jurors after their verdict with a view toward improving

93. U.S. DIST. CT. CONN. R. 11 (d):

Secrecy of Jury Deliberations. Jurors shall not at any time be inquired of by counsel or any other persons, or answer, as to the deliberations or the vote of any individual juror at any stage of the jury's deliberations except in a proceeding in open court.

Query as to whether the rule prohibits informal questioning to determine whether there was extrinsic influence on jurors.

94. W.D. TEX. R. 28 (b) (6).

95. E.D. AND W.D. ARK. R. 1 (g); CONN. R. 2 (f); S.D. IND. R. 1 (f); N.D. AND S.D. IOWA R. 8; KAN. R. 3 (h); W.D. KY. R. 2 (e); W.D. LA. R. 2 (g); ME. R. 3 (e); E.D. MICH. R. 1 (4); W.D. MICH. 4 (g); MONT. R. 1 (f); NEB. R. 5 (b); E.D.N.C. GENERAL R. 1 (J); E.D. PA. R. 7; E.D. TENN. R. 3.

96. A.B.A. COMMITTEE ON PROFESSIONAL ETHICS [hereinafter A.B.A. COMM.] OPINION 319 (Aug. 26, 1967).

97. Canon 23 was adopted by the American Bar Association at its Thirty-First Annual Meeting at Seattle, Washington, on August 27, 1908.

98. They were: (1) "[D]uring the trial lawyers should not communicate with the jurors concerning any matter for any reason, but after trial lawyers may talk to jurors about matters which have nothing to do with the previous case. In other words, a lawyer must never converse privately with jurors before, during, or after trial about the case itself . . . ." and, (2) "even though the first sentence is an absolute prohibition, arguably the next sentence limits the term 'jurors' to that period of time during which the jury members are actually serving in the litigation. Thus, the second sentence impliedly permits lawyers to communicate with jury members concerning the case after their discharge." Harnsberger, *Amend Canon 23 or Reverse Opinion 109,* 51 A.B.A.J. 157 n.5 (1965).

his jury technique. The Committee ruled in Opinion 109 that such conduct violated the Canon.[99] The Committee grafted an exception, however, stating that:

> This opinion, of course, is not intended to extend to a situation where there has been a mistake in the announcing or recording of a verdict, and in the protection of the client's interests, it may be necessary for a lawyer to interview members of the jury to prevent a miscarriage of justice. Nor does it extend to a case where the juror has been guilty of fraud.[100]

The specifically expressed exceptions are simple enough, but it is submitted that the broader goal—"to prevent a miscarriage of justice"—is as ambiguous as the Canon itself. Although the Committee recognized that a blanket prohibition against interviewing jurors could work an injustice in some instances, there remained, however, the problem of how these matters within the recognized exceptions were to be discovered unless the attorney interrogated the jurors. Opinion 109 was not universally accepted and some significant bar associations adopted a contrary rule.[101] Nevertheless, later Informal Opinions of the Committee steadfastly adhered to Opinion 109.

In 1967, Opinion 319 overruled Opinion 109 and the Informal Opinions following it.[102] The explanation given[103] is that the fundamental law today on the propriety of communications with jurors after trial is not the same as when Opinion 109 was written in 1934. Opinion 319 states that it is not unethical for a lawyer to question jurors in those jurisdictions where the affidavits or other testimony of jurors is admissible either in support of or against a motion for a new trial.[104] It also allows an attorney to

99. A.B.A. COMM. OPINION 109 (March 10, 1934).

100. *Ibid.*

101. Three opinions of the Committee on Professional Ethics of the Association of the City of New York are directly contrary to Opinion 109.

See OPINION 285 (1933), OPINION 375 (1936), *and* OPINION 767 (1952), reprinted in OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE NEW YORK COUNTY LAWYERS ASSOCIATION at 151, 199, 463 (1956). *See also* G. BRAND, BAR ASSOCIATIONS, ATTORNEYS & JUDGES 825 (1956); H. DRINKER, LEGAL ETHICS 84 n.38 (1953).

102. A.B.A. COMM. INFORMAL OPINIONS 257, 258, and 535.

Informal Opinion 257 held "a lawyer may not write or communicate with jurors either before or after trial."

Informal Opinion 258 held "jurors should conduct their deliberations and reach their verdict with the assurance that, except for fraud, there will be no subsequent investigation by anyone of their deliberations."

Informal Opinion 535 held that "after the trial, as a matter of his self-education, or where necessary to prevent fraud or miscarriage of justice, the lawyer may, with entire propriety, interview the jurors."

103. 53 A.B.A.J. 1127 (1967).

104. A number of states allow affidavits of juror's misconduct in connection with a mo-

interrogate the jurors for the purpose of improving his jury technique in those states where it is not deemed illegal.

The latest compilation available reveals that Canon 23 is official through statute or court rule, in twenty-eight states which have integrated bar associations.[105] Since expulsion from an integrated bar may terminate the right to practice law within the integrated jurisdiction, interpretation of the Canon is extensive in its ramifications. Canon 23 has also been adopted by many nonintegrated bar associations.[106] While Opinion 319 neither condones nor condemns questioning per se, the recent announcement does clear up any conflict between state permissiveness on this point and the ethical dictates of the American Bar Association.

V. Conclusion

A determination as to the propriety of post-trial examination of jurors requires that a balance be struck between the policy consideration which favors insulation of the jury and that which urges the discovery of facts tainting a jury verdict. Judicial discretion may be the answer. Judge Mathes of the southern district of California and Judge Devitt of the district of Minnesota are advocates of this solution:

> There is no prohibition against petit jurors talking about the case after they are discharged, but they may refuse to do so. There is a difference of opinion as to whether it is proper for counsel to speak to individual jurors following the entry of a verdict. The opinion of a substantial number of judges is that contacts with jurors even following the verdict tend improperly to hold jurors accountable to private interests or constitute a kind of post-trial coercion.
>
> * * *
>
> Whether the trial judge should advise the jurors upon discharge that they are free to talk with counsel about the case, as the judge is many times requested to do, is a matter within his discretion and should be exercised in the light of the facts of the case

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tion for a new trial. Some states have codified provisions so allowing: *e.g.*, CAL. CIV. PRO. §§ 657-58 (1955); IOWA CODE ANN. R.C.P. §§ 244-45 (1949); NEB. REV. STAT. §§ 25-1142, 25-1144 (Reissue 1956); OHIO GEN. CODE §§ 2321.17, 2321.20 (1954).

It should be mentioned that, although the American Bar Association does now find it ethical for a lawyer to interview, Opinion 319 stated further that great care must be taken to protect the desire of particular jurors not to talk and avoid harassment, enticement, inducement, or improper influence.

105. *See* G. BRAND, *supra* note 101. The latest information from the American Bar Association is that there are twenty-eight integrated bar associations as of October 1968.

106. *Ibid.*

> and the purpose for the inquiry. If the judge makes any statement to the jury members in this regard, it should be made clear that the jurors are free to discuss, or not to discuss, the case as they choose.[107]

Judge Christenson, a district judge for the district of Utah, espouses a similar belief:

> My own opinion is that there are circumstances which justify the interviewing of jurors after verdict, but here, as with respect to all other matters concerning the jury, it is especially important that the circumstances and the nature of the interview be carefully weighed by standards of decorum as well as law.[108]

However, there are those who would not leave the post-trial examination of jurors entirely to the court's discretion but would allow lawyers to make such examination as a matter of right. The Code of Trial Conduct of the American College of Trial Lawyers, although "intended to supplement and stress certain portions of, but not to supplant"[109] the A.B.A. Canons of Professional Ethics, takes a view different from those of both Opinions 109 and 319. The Code provides that "[i]t is the lawyers' right, after the jury has been discharged, to interview jurors to determine whether their verdict is subject to any legal challenge."[110]

That indiscriminate questioning of jurors should be prohibited does not admit to rational argument. Though jurors are performing a public function, there is a line beyond which the public interest must be subordinated to the private rights of individual jurors. Courts by prohibiting questioning are seeking to preserve those private rights. In that effort, there should be no quarter given.

It is the point at which the courts view the public function as subordinated to jurors' private rights that is dubious. The lines drawn are conceptual and in some instances shield truth and pervert the purpose of trial. Assuming that laws and ethical norms are not constructed merely to

107. W. MATHES & E. DEVITT, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 3.13 (1965).

108. Christenson, *Courtroom Decorum as an Aid to Proper Judicial Administration*, 27 F.R.D. 445, 460 (1961).

109. *A Code of Trial Conduct: Promulgated by the College of Trial Lawyers*, 43 A.B.A.J. 223 (1957).

110. AMERICAN COLLEGE OF TRIAL LAWYERS, CODE OF TRIAL CONDUCT 6 (1963). This section of the Code says:

> Before and during the trial, he [the lawyer] should avoid conversing or otherwise communicating with a juror on any subject whether pertaining to the case or not. . . .
>
> Subject to any limitations imposed by law it is a lawyer's right, after the jury has been discharged, to interview the jurors to determine whether their verdict is subject to any legal challenge. The scope of the interview should be restricted and caution should be used to avoid embarrassment to any juror or to influence his action in any subsequent jury service.

preserve incorrect verdicts, the rules regarding questioning must in the end be viewed, as courts say they do view them, as existing for the protection of jurors. However, it seems patently illogical to presume that jurors are protected by allowing questioning when a bailiff prejudices them by his words, and are not protected by allowing questioning when they prejudice themselves by a quotient verdict.

That public faith in the jury system would be weakened by permitting questioning on intra-jury-room activity affords no satisfaction. A system feared to be so weighted with concealed failings as to lose public trust should not be passed without examination. On the contrary, it warrants scrutiny.

The line between public and private interest should not be drawn at the point where the public enters upon jury deliberation. Rather, the point at which the jury violates the public law must govern. It is not for the public to inspire the trust of the system by standing mute when it fails, but for the system to retain the public trust. When the integrity of the jury or, for that matter, the honesty of a single juror fails to meet that standard, there is no private right to conceal the root cause.

Our courts will have no difficulty distinguishing a juror's inviolable reasoning processes and his harmful extralegal deviations. Nor will they be unable, upon examination, to ascertain which questions of an attorney are designed to probe the reasoning and which to unveil a wrongdoing. The complaint of a truly aggrieved party should subject a verdict to reversal, even if that complaint is framed by a juror's own words. Surely, the jury system is not so weak an institution that its preservation rests in a contrived public esteem.

The following draft is suggested for addition to courts' general rules of procedure. Within its framework the proposed questioning may be conducted. That there are other means is not doubted.[111] This is one.

I. Authority to Question

(a) Any attorney will be allowed to propound to jurors questions approved by the court, subsequent to the rendition of a verdict, to determine whether that verdict was arrived at in such manner which, if proved, could contribute to reversal of the verdict.

111. Subsequent to the writing of this Comment, post-trial questioning was considered by the United States District Court for Connecticut. The court recognized the confusion existing in this area and proposed changes in the questioning process. However, it remained firm in opposition to expanding questioning into matters which so-call inhere in the verdict. To that extent Judge Blumenfeld has not resolved the problem. *See* United States v. Miller, 36 U.S.L.W. 2646 (D. Conn., March 28, 1968).

(b) Such questioning may be conducted
  (1) orally, in the presence of the judge, and immediately following rendition of the verdict, or;
  (2) upon written interrogatories, first deposited with the court, and submitted to the jurors and returned within the time period granted for a motion for a new trial, or;
  (3) in a manner and at a time as the court in its discretion may permit.

(c) Jurors are required to respond to questions under oath or affirmation.

II. Prohibition of Other Questioning
Other questioning of jurors is prohibited.

III. Appellate Review
Denial of court approval in any expressly discretionary matter herein is not subject to appellate review except in the case of abuse of discretion.

IV. Definitions

(a) "Attorney" is one of trial record or an attorney replacing or representing the attorney of trial record who, himself, enters upon a legally recognized confidential relationship of a lawyer to his client or one who performed at trial the duties of an attorney of trial record.
(b) "Question" is either an oral or written interrogatory, asked by an attorney, which the court has had opportunity to consider for relevance.
(c) "Court" is the court of trial.
(d) "Court Review" is examination of the relevance of the content of proposed questions and of the determination of a proper attorney. Failure of the court to object shall constitute its approval after review.
(e) "Verdict" is a verdict adverse to a party to the litigation.
(f) "Other Questioning" is all intentional contact with jurors or their affairs of whatever kind, either direct or indirect, which contact relates to their verdict, their motives or the trial in which they were jurors except that included under the definition of "question."